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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 887

BOTANY WORSTED MILLS,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 888

BOTANY WORSTED MILLS,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FREDERIC R. SANBORN,
Of Counsel for Botany Worsted Mills.

THE COURT PRESS, N. Y. C.

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NATIONAL LABOR RELATIONS BOARD,

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Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Botany Worsted Mills, petitioner herein (hereinafter referred to as "Botany") prays that writs of certiorari issue to review the order of the United States Circuit Court of Appeals for the Third Circuit, entered on February 1, 1943, and the decree, judgment or order of the said court denying the petition of Botany to set aside the order of

the National Labor Relations Board, the decision of the said court denying Botany's motion to adduce additional testimony and the decree granting the petition of the National Labor Relations Board to enforce its order within the limits of construction stated in the court's opinion, and as modified thereby.

Opinions Below.

The findings of fact, conclusions of law and order of the National Labor Relations Board (hereinafter referred to as "Board") are printed in the record. They are published in the official reports of the Board in 41 N. L. R. B. 218. The opinion of the United States Circuit Court of Appeals has not been officially reported, but is attached to the certified record.

Jurisdiction.

The judgment and order of the Circuit Court of Appeals was entered February 1, 1943. The jurisdiction of this Court is invoked under §240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. §347(a) and §10(e)) of the National Labor Relations Act (29 U. S. C. A. §160(e)), and under Rule 38 of this Court, §5.

Statute Involved.

The Statute involved is the National Labor Relations Act, which we shall here refer to as the "Wagner Act" or "The Act" (29 U. S. C. A. §151 *et seq.*). The pertinent provisions of the Act are: 29 U. S. C. A. §§151, 157, 158, 159 and 160.

Questions Presented.

1. Whether there is substantial evidence to sustain the Board's finding that trappers and sorters (32 out of 6500 employees) constitute a unit appropriate for collective bargaining.

2. Whether there is substantial evidence to sustain the finding that the union was, on December 13, 1940 and at all times thereafter, the exclusive representative of the employees in the unit for the purposes of collective bargaining.

3. Whether the Labor Board has accorded these employees their right freely to choose their collective bargaining agent.

4. Whether Botany was accorded fair hearings and due process of law in the proceedings before the Board.

5. Whether the Board's order should be enforced.

6. Whether the Act sets up a sufficiently ascertainable standard to determine the appropriate unit for collective bargaining.

Statement.

Botany is a New Jersey corporation having its principal office and place of business in Passaic, New Jersey. It operates a large woolen mill and employs approximately 6500 people. In its plant all the operations necessary to manufacture finished woolen and worsted fabrics are performed.

Upon the receipt of raw wool at the mill it must receive preliminary preparation for manufacturing processes. It is first necessary to separate the good from the bad.

The employees who perform this work are the subject of all the prior proceedings and of this appeal. They are called according to the type of work that they have done, sorters or trappers.

On or about March 8, 1940, Textile Workers Union of America, hereinafter referred to as the "Union", filed a representation petition with the National Labor Relations Board. Under the petition, the Union sought an election to determine whether or not it should be the agent for the purposes of collective bargaining, for the aforementioned sorters and trappers at Botany. A hearing was thereafter held, starting on or about August 9, 1940. Testimony was taken to determine whether the group set forth in the petition was an appropriate unit and whether or not an election should be held. The Board, however, refused to hear evidence of the desires of the employees involved concerning the appropriate collective bargaining unit: it refused to allow any cross examination of union officials concerning such desires, and refused Botany's request for subpoenas to the employees designed to elicit evidence of the unit desired by them.

The Board directed an election by its order of October 7, 1940 (Bd. A. 9-16). In its decision it selected as the appropriate unit the unit requested in the petition, to wit, sorters and trappers (Bd. A. 12, 13). The sorters and trappers composed a group of 32 to 42 employees out of 6500 (Bd. A. 13, 16, 17). An election was held on November 8, 1940, in which 32 employees voted. Eighteen employees voted in favor of the Union and 14 voted against the Union (Bd. A. 16, 17). The Union was thereafter certified on December 13, 1942 to be the collective bargaining agent for the aforesaid unit (Bd. A. 16, 17).

Between the date of the election, November 8, 1940, and the date of the certification by the Board, December 13, 1940, Botany received two letters signed by 20 of the

employees that voted in the election (Bd. A. 117, 118). These letters were written on or about November 15, 1940, and were received at a somewhat later date. In the letters, the employees signing them stated that "a goodly percentage of we wool sorters and trappers do not think being members of the C. I. O. will benefit us or our fellow workers and therefore do not wish to join that organization." At no time has any one charged, or even suggested, that these letters arose from any influence or act of Botany, or from any unfair labor practices, or indeed from anything other than the free will of the employees.

The result of these occurrences was to place Botany in an anomalous position. Under the Act, an employer is required to bargain with the freely chosen agent of its employees. As a result of the election and subsequent certification by the Board, the Union had been declared the agent. As a result of the action of the employees, the agency had been revoked. What was Botany to do?

The record shows that the Union in or about January, 1941, approached Botany for the purpose of bargaining (Bd. A. 40, 86-88). At this time Botany could not validly bargain with the Union, due to the revocation of the agency by the employees. The Union was so informed by a letter of March 21, 1941 (Bd. A. 48, 49). Moreover, the 20 employees signing the letters had attended a secret Union meeting at or shortly after November 15, 1940, and stated that they no longer wished to be represented by the Union. (Both the letters and the testimony were offered in evidence and refused (Bot. A. 72-a, 73-a) at the subsequent hearing.) The Union thereupon filed an unfair labor charge with the Board on or about January 14, 1941. A complaint was issued by the Board on or about June 2, 1941 and hearings held upon the charge in June of 1941.

Prior to any knowledge by Botany of the hearing, Botany attempted to reopen the whole proceeding, in order to call to the attention of the Board the fact that the employees had revoked any agency created, and to hold a new election (Bd. A. 110-118) to determine the wishes of the employees. Botany's attempt to reopen the case was denied by the Board (Bot. A. 7-a, 8-a).

Botany made further attempts to get the evidence of revocation before the Board. On June 11, 1941, Botany applied to the Regional Director of the Board for subpoenas to the 20 employees. The Regional Director denied the application without prejudice to Botany's right to renew the application before the trial examiner. The application was renewed before the trial examiner on June 16, 1941 (Bot. A. 45-a, 46-a). The trial examiner reserved decision and later denied the application (Bot. A. 55-a, 56-a).

At the hearing and in its answer, Botany took the unqualified position that it was not guilty of an unfair labor practice in refusing to bargain with the Union. In its answer it pleaded the following five affirmative defenses: (1) that the employees had revoked the authority of the Union to act for them as their collective bargaining agent; (2) that Botany had requested a reopening of the case to take the testimony of the employees, which request had been denied; (3) that the unit of sorters and trappers was not an appropriate unit; (4) that the Board had acted arbitrarily and unreasonably in making its determination of the unit by its decision of October 7, 1940; (5) that Section 9, subdivision (b) of the National Labor Relations Act was unconstitutional in that it did not set up an ascertainable standard by which an appropriate unit could be determined (Bd. A. 96-101).

In addition to refusing the issuance of the 20 subpoenas, the trial examiner struck out the five affirmative defenses (59a-64a).

The Board thereafter determined that Botany was guilty of an unfair labor practice in refusing to bargain with the Union and on May 25, 1942, issued its order requiring Botany to bargain with the Union (Bd. A. 18-35).

Thereafter, Botany petitioned the Circuit Court of Appeals, Third Circuit, to review and set aside the order of May 25, 1942. Botany also moved for leave to adduce additional testimony specifically referring to the testimony of the 20 employees. At the same time, the Board petitioned for enforcement of the order. All of these proceedings appear in the certified record.

On February 1, 1943, the decisions of the Circuit Court of Appeals were entered as an order and decree, respectively. The court by its order denied Botany's petition to set aside the order of May 25, 1942. The court has made no order specifically denying Botany's motion to adduce additional testimony although in its decision filed January 18, 1943, the motion was denied. By decree, the court ordered Botany to cease and desist from refusing to bargain with the Union. The decree substantially affirmed the decision and order of the Board. A modification of the Board's order was made, in that the court determined that there was absolutely no coercion on the part of Botany in connection with its employees. (The Board had made no such allegations in its complaint.)

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that a unit of 32 trappers out of 6500 employees constitutes a unit appropriate for collective bargaining.

2. In holding that there was substantial evidence that the Union was the exclusive representative of all em-

ployees in the bargaining unit selected at the time when a refusal to bargain collectively was charged.

3. In holding that Botany received a fair hearing and that due process of law was observed.

4. In failing to set aside the order of the Board upon the ground that by appointing as trial examiner the attorney who had conducted the preliminary investigation and preparation for the hearing, Botany was denied a fair and impartial hearing.

5. In failing to set aside the order of the Board for the reason that the trial examiner and the Board admitted into evidence over the objection of Botany a document that the trial examiner had not read.

6. In failing to set aside the order of the Board for the Board's refusal to permit inquiry into the desires of the employees themselves concerning the appropriate unit for collective bargaining purposes.

7. In failing to set aside the order of the Board for denying Botany the right to examine a witness and learn the names of certain other witnesses who could have given relevant testimony.

8. In refusing to hold that the entire record of the *Arlington Mills* case, 31 N. L. R. B. 21, should have been admitted into evidence.

9. In failing to set aside the order of the Board for refusal to issue subpoenas to secure the evidence of the employees themselves concerning the appropriateness of the unit and their desire to be represented by the Union.

10. In denying the motion of Botany to adduce additional testimony.

11. In failing to hold that the Act is unconstitutional in that it does not set up an ascertainable standard by which the appropriate unit for collective bargaining can be determined.

The Reason for Granting the Writs.

a. The decision below in upholding the order of the Board that 32 trappers constitute a unit appropriate for collective bargaining is in conflict with the simultaneous holding of the Board in *Arlington Mills*, 31 N. L. R. B. 21.

b. The decision below gives sanction to the selection of a unit which has never before been held appropriate.

c. The decision below gives sanction to the unfair act of the Board in appointing as trial examiner an attorney who had made the preliminary investigation in the proceeding and who could not act impartially.

d. The decision below encourages the organization of employees into small groups with a resulting serious handicap to employers in the efficient operation of their business.

e. The decision below sanctions the actions of the Board in refusing to allow the introduction of material and relevant evidence and in cutting off the right of Botany to cross-examine.

f. The decision below denies to the employees the full freedom of choice of their bargaining agent granted to them by the National Labor Relations Act.

g. The decision below in enforcing the order of the Board has in effect allowed the Board to deprive Botany of its rights without due process of law.

h. The questions presented are of great public importance.

WHEREFORE, your petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue writs of certiorari, directing the United States Circuit Court of Appeals for the Third Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the judgment and order of the Circuit Court of Appeals may be reversed and that your petitioner may have such other and further relief as to this Honorable Court may seem just.

Dated, April 2nd, 1943.

BOTANY WORSTED MILLS,
Petitioner.

By FREDERIC R. SANBORN,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

The essential facts, together with the jurisdictional facts, have been stated in the petition and we do not repeat them here for reasons of brevity.

POINT I.

The Appropriate Unit.

The decision of the Board in selecting as the appropriate collective bargaining unit 32 employees out of the large number of 6500 stands out as a most unprecedented determination.

The Board has considered many other woolen mill cases. In none of them has it gone so far as to select a unit similar to the unit selected in the instant case.

Oregon Worsted Co., 2 N. L. R. B. 417;
American Woolen Co., 5 N. L. R. B. 144;
California Wool Scouring Co., 5 N. L. R. B. 782;
Spray Woolen Mill, 5 N. L. R. B. 393;
Colonie Fibre Co., Inc., 9 N. L. R. B. 658;
Atlanta Woolen Mills, 11 N. L. R. B. 167;
Rock River Woolen Mills, 18 N. L. R. B. 828;
Barre Wool Combing Co., 19 N. L. R. B. 1008;
Crown Worsted Mills, 21 N. L. R. B. 1028;
Washougal Woolen Mills, 23 N. L. R. B. 1;
Arlington Mills, 31 N. L. R. B. 21.

In Botany we have an integrated organization with employees whose work is closely coordinated and whose joint

efforts create finished cloth from raw wool. There are 6500 of these employees. Does the Board have the power to select a small number, 32, and call this number a unit appropriate for collective bargaining? Is there any limit to the power of the Board? Can it create two hundred of such units in one plant? These are questions that must be answered.

It is not unreasonable to conclude that a number of small organized units throughout a plant could and probably would seriously hamper production. The Board has given recognition to the reasonableness of this conclusion by virtue of the fact that never in the past has it selected a similar unit. In fact, the Board has affirmatively decided that a unit of sorters and trappers is not an appropriate unit. This decision was made by the Board almost simultaneously with its decision in the *Botany* case. We refer to the *Arlington Mills* case, which decision came down approximately one week after the *Botany* decision (*Arlington Mills, supra*). A close examination of the facts of both cases reveals that they are identical. Both companies were engaged in the manufacture of woolen goods. Both had so-called departments of sorters and trappers. Both departments performed identical work. Employees were interchanged within the plant in both companies. Both companies were partially organized. In both companies there had been an attempt to organize on a plant-wide basis. The unions in each case would admit to membership all of the employees of the mills. Both companies had highly integrated manufacturing processes and both had a single labor or personnel director. In both cases the unions claimed to have members in other parts of the plant.

It is impossible to discover a closer set of facts in any decision. It would seem that an administrative board

would have to pass on both cases in the same manner. The Circuit Court of Appeals, Seventh Circuit, has established the desirability of consistency in administrative rulings in *N. L. R. B.* v. *Mall Tool Co.*, 119 F. (2d) 700. It was therein stated at page 702:

> "(2, 3) Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. Under such circumstances, affirmative orders violate administrative discretion and become punitive, rather than remedial measures, outside the scope of the Board's powers. *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, 61 S. Ct. 77, 85 L. Ed. ——; *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 59 S. Ct. 490, 83 L. Ed. 627, 123 A. L. R. 599."

Nevertheless, in the *Arlington* case, the Board determined that the unit was not appropriate and in the *Botany* case, the Board determined that the unit was appropriate. The decisions are completely inconsistent, although made within one week of each other. The Board itself in its decision made absolutely no attempt to differentiate between the two cases. The Board clearly bases its decision upon its so-called "policy" that in all cases collective bargaining should be made immediately available to the employees. The language of the Board's decision is:

> "* * * Wherever possible, it is obviously desirable that, in a determination of the appropriate unit, we render collective bargaining of the company's employees an immediate possibility.
>
> * * *
>
> Consequently, even if under other circumstances, the wool sorters or trappers would not constitute the most

> effective bargaining unit, nevertheless, in the existing circumstances, unless they are recognized as a separate unit, there will be no collective bargaining agent whatsoever for these workers" (Bd. A. 12).

This policy has by inference been approved in the decision of the Circuit Court of Appeals.

Neither in the decision of the Board nor in the decision of the Circuit Court of Appeals is an attempt made to justify why collective bargaining should not be made immediately available to Arlington employees and yet should be of such prime importance to Botany employees.

Petitioner, by this appeal, directly questions the power of the Board to apply such a policy, both in view of the fact that no such policy has been declared by Congress in the Act, and also because of the peculiar circumstances of this case. The policy has never received express judicial approval and, so far as petitioner knows, has never been directly questioned in any other case. Petitioner challenges the Board to show its legislative authority to adopt such a policy.

The present language of the Act provides that the Board has the power to select a craft unit, a plant unit, an employer unit, or subdivision thereof (28 U. S. C. A. Sec. 159, Subdiv. (b)). The language of the Act was not always in this form. While the Act was under consideration in the Legislature, the language read: "craft unit, plant unit, employer unit, or any other unit" (House Committee Report No. 1371, 74th Congress, First Session). This language was criticized in committee and a report made to the House of Representatives on this point. Congressman Connery, as Chairman of the Committee, submitted the Committee Report to the First Session of the 74th Congress on May 21, 1935 specifically referring to

paragraph 9-b of the Act (that which gave the power to select the appropriate unit). It was stated:

> "House Amendment #11 which redrafted section 9(b) embodied two changes from the Senate Bill. The first change undertook to express more explicitly the standards by which the Board is to be guided in deciding what is an appropriate unit. The conference agreement accepts this part of the amendment. The amendment also added a proviso designed to limit the otherwise broad connotation that might be put upon the phrase 'or other unit'. The proviso, however, was subject to some misconstruction and the conferees have agreed that the simplest way to deal with the matter is to strike out the undefined phrase 'other unit'. It was also agreed to insert after 'plant unit' the phrase 'or subdivision thereof'. This was done because the National Labor Relations Board has frequently had occasion to order an election in a unit not as broad as 'employer unit' yet not necessarily co-incident with the phrases 'craft unit' or 'plant unit'; for example, the 'production and maintenance employees' of a given plant."

The above criticism of the Act shows clearly that Congress was deeply concerned with the question of appropriate unit. It intended to limit the authority of the Board in this respect. The language was changed from "plant unit, or other unit" to "plant unit, or subdivision thereof". This language modifies "appropriate unit". There is nothing else in the committee reports on this point. There is nothing in the Act and nothing in the committee reports which would give rise to any inference of authority on the part of the Board to adopt an independent policy of its own to make collective bargaining immediately available to employees, without awaiting the existence of a majority in a type of unit specified by the

phraseology of the Act. The Board is required to select the appropriate unit and nothing else. The language of the Act and the above report shows the intention of Congress clearly. The Board has nevertheless used its position to arbitrarily conceive the policy. Petitioner, again, challenges the Board's authority to invent such a policy.

The practical evils of the "policy" stand out in the instant case, when considered quite apart from the Board's lack of statutory power arbitrarily to create this unauthorized unit. Botany, the same as any other business organization, is an economic entity. In order to operate successfully, it must operate efficiently. In order to produce, it must operate efficiently. If the above "policy" of the Board is lawful and if two hundred other units of similar size were organized at Botany, perhaps by a number of different unions, and certified by the Board, Botany would be unable to operate or produce efficiently. In the long run, all of the employees, the other 6468 as well as the 32 sorters and trappers, would suffer. It is a definite possibility that, being unable to conduct its business efficiently, Botany might eventually close its doors, all of its employees losing their means of livelihood and all others losing the benefit of its production. This is not far-fetched. Our industrial history is full of instances in which labor difficulties have caused the failure of business organizations. To permit such a situation to exist is impossible. Under ordinary circumstances the citizens of this country could not afford to have their economic welfare endangered by the extremes that this decision of the Board makes possible. At the present time, when the production of goods and material is of such paramount importance for the actual existence of this country, such possibilities must be made impossible. Botany is now engaged largely in production for the war. Yet if the Board's decision applying its "policy" to the circumstances

of the instant case is sustained, industry will suffer from additional delays and difficulties in production.

The Board makes the hackneyed argument that Botany adopts an inconsistent attitude in refusing to bargain with a unit of 32 employees and yet expresses a willingness to bargain with 6500 employees. On the face of it, this frequently used argument sounds reasonable. On close inspection, its fallacy is apparent.

There are two desirable ends which must be balanced: (1) the rights of employees to collective bargaining representation; (2) the paramount necessity for efficient production. To throw either one out of balance might result in unjust treatment for the employees or production chaos for all.

It is quite obvious that an employer can accomplish the greatest efficiency of production in a plant with the least amount of labor friction. Obviously, small organized groups could and would provide greater labor friction than one large group or no group at all. So far as "policy" can enter into the decision at all, it is up to the Board and the courts which regulate the actions of the Board, to balance the rights of the employee against the great necessity for production. Is it not unbalanced in the instant case where the Board makes such a far-reaching decision as to select a group of 32 out of 6500? Should it not be recognized that even labor should bow to the common welfare of all during peace-time as well as during times of war?

The argument is also fallacious by reason of the fact that an employer in dealing with an unorganized group has a general labor policy developed by time and usage. In normal instances he is therefore not under the necessity of negotiating 6500 individual contracts where he has 6500 employees.

It is the general rule that in order to be sustained, the finding of an administrative board must be based on substantial evidence. *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197. Petitioner respectfully urges that the findings of the Board, far from being based upon substantial evidence, are not supported by any evidence whatsoever.

POINT II.

The agency of the Union was revoked by the employees.

We have pointed out that the circumstances of the *Botany* case are unusual. There is no direct precedent for the decision of the Board.

The Board virtually admitted that the sorters and trappers were really not an appropriate unit. The petition, therefore, could not be granted unless some extraordinary steps were taken. To accomplish its purpose, whether or not the purpose was authorized by the Act, the Board applied its so-called policy of creating an artificial "majority" so as to make bargaining immediately available to this tiny minority fraction of employees.

Under the circumstances of this case, it was most improper. When we consider the fact that the election was determined by exactly four votes (Bd. A. 16, 17), the decision appears most reprehensible.

The arbitrary nature of the Board's action is emphasized by its wilful and utter disregard of the wishes of the employees themselves. It was informed on numerous occasions that twenty of the employees did not desire to be represented by the Union and that they had so notified the Union shortly after the election (Bd. A. 117, 118) and long before the Union attempted, without justification, to

jockey Botany into a false appearance of refusing to bargain. The Board, of its own accord, should have used all means and machinery to investigate the situation and to determine the desires of the employees which it was created to protect. Paradoxically, it took the opposite view. It refused to issue subpoenas so that such testimony could be taken. It absolutely refused to consider such evidence at all (Bot. A. 45-a, 46-a, 45-a–75-a).

Botany's attorneys had no power to issue subpoenas. Under the Board's procedure, only the Board can issue subpoenas (Rules & Regulations of N. L. R. Bd., Sec. 21). By the refusal of the Board to act, Botany was rendered helpless as far as the production of this testimony was concerned. Such action by the Board and its agents has been severely criticized. In *Donnelly Garment Co.* v. *National Labor Relations Board*, 123 F. (2d) 215, the Circuit Court of Appeals stated at page 222:

> "The Trial Examiner refused to receive this evidence. He permitted the petitioners to make formal offers of proof.
>
> "The Trial Examiner seems to have confused the admissibility of this proffered testimony with his estimate of its weight and sufficiency and of the probable credibility of the witnesses who were to be called upon to give it. In his rulings he referred to the presence of the officers of the Company at the hearing and apparently he was of the opinion that if the Board's evidence was sufficient to justify a finding that the Donnelly Garment Workers' Union was fostered, supported or dominated by the Company, that would render the proffered testimony inadmissible. * * *
>
> "It was not shown that any of the employees of the Donnelly Company whose testimony was offered was under any disqualifying disability. There was no

> presumption that these employees would commit perjury, and, even if the Trial Examiner believed that they would perjure themselves, that would not have affected the admissibility of their evidence. It is elementary that there is a distinction between the admissibility of evidence and its weight or sufficiency. *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 5 Cir., 98 F. 2d 870, 871. Surely if the testimony of an employee which tends to prove that an employer interfered with or supported the organization of an independent union is admissible, the testimony of an employee which tends to disprove domination and support of such a union by an employer is equally admissible. Evidence is relevant if it tends either to prove or to disprove any issue in a case."

The refusal of the Board to admit this testimony should receive sharp criticism.

In defense of its refusal to admit the testimony of the twenty employees, the Board argues that to have admitted the testimony at the time it first became available would make efficient administration impossible. In this respect the Board has still another "policy" not to be found within the four corners of the Act. The Board has declared that there is a presumption—apparently irrebuttable—of continuity; that once the status of a collective bargaining agent is ascertained, it is presumed—irrebuttably—that that status continues. The Act says nothing about this. The Act creates no presumption. The Act explicitly and as a matter of national policy (Sec. 1, fourth paragraph) gives to the employees "full freedom" to designate their collective bargaining agent.

Perhaps the Board can reasonably argue that in some circumstances the presumption—if rebuttable—adopted by it might be convenient, even though not authorized by the Act. The Board in fact has recognized by some decisions

that the presumption should be rebuttable by the Union under certain circumstances:

> *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 Fed. (2d) 760, 764-765 (C. C. A. 7);
> *International Assn. of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 81-83;
> *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 340;
> *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 412;
> *Oughton* v. *National Labor Relations Board*, 118 Fed. (2d) 486 (C. C. A. 3);
> *National Labor Relations Board* v. *New Era Die Co.*, 118 Fed. (2d) 500, 505 (C. C. A. 3);
> *National Labor Relations Board* v. *Whittier Mills Co.*, 111 Fed. (2d) 474, 478 (C. C. A. 5).

An examination of these cases reveals that in every case the employer had been guilty of an unfair labor practice, usually to oust the union theretofore declared to be the collective bargaining agent.

Contrariwise, in the *Botany* case, the Circuit Court of Appeals has directly held that there is not the slightest evidence that Botany sought to coerce or influence its employees. There is therefore not the slightest reason why the presumption should not be rebuttable.

The ordinary meaning of a presumption is that it merely shifts the burden of going forward with the evidence. There was overwhelming evidence available to overcome the presumption in this case. The employees would have testified that even though at one time they had shown their desire for the Union, subsequently they desired to withdraw and to change that designation. This dependable evidence would have come from the mouths of the

employees themselves and from the Union officials on the very important point of representation. There is no question but that the Board should have admitted such evidence. The proceeding should have been reopened. The employees should have been given the "full freedom" of choice of agent expressly accorded to them by the Act.

We are in the field of administrative law. This field is supposed to be a liberal field. An administrative agency is created for the purpose of avoiding the technicalities of the law which sometimes cause undue hardships to individuals. The National Labor Relations Board was given the power to avoid these technicalities. Congress did not intend that the Board should adopt such a discriminatory and arbitrary attitude so as to close its mind and machinery to the true facts solely for alleged "policy" or "convenience".

To reopen the case and to have held another election would have been of little trouble to this Board. It was not a matter of holding an election among 6500 employees. It was merely a matter of holding an election among 32 employees. It would not have taken ten minutes to have held such an election. Slight inconvenience would have been caused. Nevertheless, the Board stubbornly adhered to its so-called presumption. It refused Botany an opportunity to rebut the presumption and gave the "full freedom" of the employees to express their desires absolutely no consideration.

POINT III.

The Unfair Hearings.

No citation of authority is needed to support the proposition that the constitutional guarantee of due process of law entitles every person to a fair and impartial trial.

The rules of evidence used in our courts of law are all directed toward this laudable end. It has been argued, not always correctly, that sometimes to prove or disprove a cause of action in a court of law is difficult because of the technical rules of evidence. Administrative law has recently developed with the avowed purpose of avoiding the aforesaid technical rules of evidence. Nevertheless, it is still a basic truth that every person is entitled to a fair hearing.

Morgan v. *U. S.*, 298 U. S. 468; 304 U. S. 1.

The requirements of a fair and impartial trial or hearing also apply to hearings involving unincorporated organizations, associations, corporations and in any forum where persons called officials pass upon the rights of other persons. It has become the rule that a person has not received a fair trial when any other person who has the power to pass upon his rights is biased or prejudiced.

Gilmore v. *Palmer*, 179 N. Y. Supp. 1;
Grassey Bros. v. *O'Rourke*, 153 N. Y. Supp. 493;
Plasterers and Stonemasons Union v. *Bowen*, 183 N. Y. Supp. 855, aff'd 198 App. Div. 967.

It has accordingly become the rule that wherever a person acting in a judicial or quasi-judicial capacity discovers that he has any connection with, or any bias or prejudice in, a matter, he automatically disqualifies himself. This basic principle applies to the National Labor Relations Board as well as to any other administrative organization. Yet, in the instant case, we find that the Board appointed as trial examiner in the election proceeding the attorney who made the original investigation for the purpose of bringing on the proceedings. Surely such a person could not be unbiased. Opinions are necessarily

formed in an investigation. The investigator is only human and, regardless of the effort he might use, his bias and prejudice must creep in at the hearing. He could not help but allow his bias and prejudice to affect his intermediate report to the Board and especially any recommendations that he might be called upon to make.

The Board has argued that a trial examiner has no power of determination. This is true. In many instances a supervisory employee has no power to hire and fire other employees, but merely has the right of recommendation and suggestion to the employer. Nevertheless, the Board has held that such a supervisory employee is improperly a member of a union because of the great weight that will be given by the employer to his recommendations. Similarly, the trial examiner exerts tremendous influence on the decision of the Board. His power of suggestion and his right of recommendation in his intermediate report, we would venture to say, are followed in the large majority of the cases. It is therefore extremely unfair to appoint as trial examiner a person who may allow bias or prejudice to creep into his rulings and into his recommendations to the Board proper.

The record of the instant case shows many occasions on which the trial examiner acted unfairly. One of the first such acts occurred when the trial examiner received in evidence a document offered by the Union, without deigning to read the same (Bot. A. 19-a). Botany was also prevented from cross-examining one of the witnesses upon the question of authority to bring the representation petition (Bot. A. 20-a, 21-a). At another point, the trial examiner refused to issue a subpoena requiring the production of the minutes of Local 343. It was the purpose to show that Local 343, the organization to which all of the employees belonged, had not authorized the bringing of the petition, but that the national union brought the

petition without any authority whatsoever from the employees or from Local 343. Also when Botany sought to obtain the names of the employees of Botany who were members of Local 343 for the purpose of determining their desires in the representation proceeding the trial examiner again denied the application (Bot. A. 33-a, 34-a, 35-a, 42-a).

These are only some of the unfair acts. The record clearly shows that the trial examiner had a biased and prejudicial attitude during the entire proceeding.

The Board was not faced with a situation where only one trial examiner was available. The Board has many such employees. It would seem that in all fairness it should have selected one of the others. Nevertheless, for some undisclosed reason, the Board elected in this case to use as the trial examiner the original investigator in the preliminary proceeding.

POINT IV.

The Question of Constitutionality.

It is an elementary principle that in order to be constitutional a statute must be definite. It must set forth sufficiently ascertainable standards so that its meaning may be determined. In the case of administrative boards it must set forth sufficiently ascertainable standards to indicate the limitation of authority and power on the part of the administrative board as a guide to the board. Nonconformance with this principle renders the statute unconstitutional.

Small v. *American Sugar Rfy. Co.*, 267 U. S. 233;
In re Di Torio, 8 F. (2d) 279;
Schechter v. *U. S.*, 295 U. S. 495.

It has been assumed that the National Labor Relations Act has undergone the test of the above principle in *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146. In that case, the court stated:

> "We find adequate standards to guide the Board's decision."

That language is not controlling in the instant case, for the reason that in the *Pittsburgh* case the Board considered only the words "employer", "plant", and "craft". The court did not consider the phrase "plant unit or subdivision thereof". The latter phrase is the indefinite part of the Act. Since it was not considered in the *Pittsburgh* case, the constitutional question was not completely before the court. The decision in the *Pittsburgh* case is therefore merely dictum insofar as it may be claimed to be applicable to the attempted interpretation by the Board of the statute in the instant case.

It has heretofore been stated that the Board has conceived as a policy that wherever possible it is desirable that collective bargaining be made immediately available to the employees. The Board has interpreted the statute as meaning that it has the authority to create such policy. Under this alleged policy, there is absolutely no limitation and no standard for the Board to follow in determining appropriate subdivisions within the plant unit. The Board practically asserts that its decision was not made under the Act. It has affirmatively stated in its decision that it has not followed the standards set up by the Act, but has stepped beyond the requirements of the Act in order to effectuate its policy to make collective bargaining immediately available to a minority of the employees. If the Act permits of such interpretation as to the power and authority of the Board the Act is unequivocally unconsti-

tutional. If the Act does not permit of such an interpretation the Board has exceeded its power. In either event the Board's decision should be set aside.

Conclusion.

We respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers in order that the serious and important questions which have been decided by the court below in such a manner as to constitute a departure from the accepted and usual course of judicial proceedings may be corrected and properly decided by this Court, and that to such end the petition for writs of certiorari should be granted.

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 887, 888

BOTANY WORSTED MILLS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions of the court below (R. 19b–32b, 55b), are not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 18–35) are reported in 41 N. L. R. B. 218. The decisions of the Board in a prior representation proceeding which forms a part of the record in this case (R. 9–17) are reported in 27 N. L. R. B. 687 and 28 N. L. R. B. 538.

JURISDICTION

The decree of the circuit court of appeals was entered on February 1, 1943 (R. 33b–35b). The

petition for writs of certiorari was filed on April 5, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the standards set up in Section 9 (b) of the Act for the Board's determination of the unit appropriate for the purposes of collective bargaining are so indefinite as to constitute an unconstitutional delegation of legislative powers.

2. Whether, in the circumstances of this case, the Board's determination of the unit appropriate for the purposes of collective bargaining constituted a proper exercise of the Board's discretion.

3. Whether there was substantial evidence to support the Board's finding that a specified union was, on December 18, 1940, and at all times thereafter, the exclusive representative, for the purposes of collective bargaining, of the employees in an appropriate unit.

4. Whether petitioner was denied due process of law in the proceedings before the Board by reason of the fact that the Trial Examiner who presided at the hearing in the proceeding for investigation and certification of bargaining

representatives had acted as attorney for the Board in the investigation prior to the hearing.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 17–18.

STATEMENT

On March 8, 1940, Textile Workers Union of America, affiliated with the C. I. O., herein called the Union, filed with the Board a petition for investigation and certification of representatives under Section 9 of the Act (R. 9). After appropriate proceedings the Board issued its Decision and Direction of Election, containing its findings of fact and conclusions of law (R. 9–14).

With respect to the bargaining unit, the Union contended before the Board that petitioner's wool sorters and trappers, including overlookers, constituted an appropriate unit, whereas petitioner contended that its sorters and trappers could not be set apart from the rest of the employees (R. 12). The Board found that the sorters and trappers were in a separate department (R. 12; R. 50–52, 57, 68);[1] that they had been organized by the Union (R. 12; R. 11, 55, 58); and that there was no evidence that any of the other employees

[1] In those portions of the Statement which describe the findings of the Board, references preceding the semicolon are to the Board's findings and succeeding references are to the supporting evidence.

desired to be represented by any union (R. 12; R. 23a). It concluded that although under other circumstances the small unit sought might not be the most effective possible, nevertheless, in order to effectuate the purposes of the Act, it was "obviously desirable" to "render collective bargaining * * * an immediate possibility." It therefore found that the unit urged by the Union was appropriate (R. 12–13), and accordingly directed the holding of an election to ascertain whether or not the employees in that unit desired to be represented by the Union (R. 14).

An election was held on November 8, 1940, in which 18 employees voted for and 14 voted against the Union (R. 16). On November 18 and 19, after expiration of the 5-day period allowed by the Board's Rules and Regulations for the filing of objections to the election, petitioner filed a request and motion for "reargument" of the Decision and Direction of Election, for setting aside the election, and for reopening of the record (R. 16–17, 102–107). The only matter advanced in this motion which had not already been urged before the Board was that the issues in the instant case were allegedly the same as those in another case then pending before the board, *Matter of Arlington Mills,*[2] and that the Board had taken inconsistent

[2] Known in the records of the Board as 1–R–499 and 1–R–513. The Board's subsequent decision in that case is reported at 31 N. L. R. B. 21.

positions in the two proceedings. On November 28, 1940, petitioner, in further support of its motion, filed an affidavit stating, as an entirely new ground for relief, that certification should be denied the Union because, as alleged on information and belief, some of the employees who had voted "yes" in the election, on the question whether or not they wished to be represented by the Union, had understood that they were voting "for the Company" (R. 108–109). The Board denied the motion and on December 13, 1940, certified the Union as the exclusive bargaining representative of the employees within the unit found appropriate (R. 16–17).

Between December 27, 1940, and January 14, 1941, the Union made repeated efforts to arrange a conference with petitioner's officials; its efforts were unsuccessful, since petitioner either evaded or ignored its written and oral communications (R. 24–25; R. 40, 86–89). On January 14, 1941, having received no reply to a letter of January 8, 1941, requesting petitioner to arrange a conference, the Union filed charges with the Board alleging that petitioner had illegally refused to bargain collectively with it (R. 18, 25; R. 18, 41). On the same day, petitioner wrote to the Union, stating that it could give no reply to the Union's requests for a conference until petitioner had decided on a "definite policy" (R. 25–26; R. 42–43).

The Union's subsequent letters to petitioner were not answered (R. 26; R. 44–46, 64a).

On March 7, 1941, petitioner filed with the Board a motion to set aside its certification and to reopen the representation proceedings (R. 110–118). In support of this motion, petitioner alleged, as "new evidence" affecting the Union's majority status, that it had received two communications, dated November 15, 1941, signed by 20 of the employees in the appropriate unit, stating that they did not wish to join the Union (R. 113–114). Although this motion was filed in March 1941, petitioner averred in its brief in support thereof, that it received these communications "in late November" (R. 26).[3] Petitioner prayed the Board to take further testimony concerning the desires of the employees with reference to representation for collective bargaining purposes and to consolidate the proceeding with the *Arlington Mills* proceeding, referred to above (R. 110). The Board denied this motion on March 12 (R. 7a–8a). Thereupon, the Union again requested petitioner to enter into negotiations with it. Petitioner denied this request on March 21 in a letter in which it invited court review of its actions (R. 26–28; R. 47–49).

On June 2, 1941, the Board issued its complaint against petitioner alleging that it had violated

[3] Petitioner subsequently stated that it received these communications "on or about November 15." (R. 97–98).

Section 8 (1) and (5) of the Act, and a hearing thereon was held from June 16 to June 18 (R. 19, 91–93). In its answer to the complaint, petitioner enlarged upon the original statement in the communications of November 15 that the signers did not want to join the Union; it now alleged that the employees had advised it that they did not want to be represented by the Union (R. 97–98). At the hearing, petitioner went further and offered for the first time to prove that the employees, in addition to communicating with their employer, had notified the Union of their alleged change of heart at a Union meeting held soon after November 15 (R. 72a).[4]

On March 25, 1942, the Board issued its Decision and Order in which it held, on the facts set forth above, that the bargaining unit as found in the representation proceeding was appropriate, that the Union represented a majority of the employees in that unit, and that petitioner had refused to bargain collectively with the Union, in

[4] In its answer in the complaint proceeding, petitioner raised again, by way of separate defenses, various issues which it had raised in the representation proceeding (R. 97–100). On motion of the Board's attorney, the Trial Examiner struck from the answer that portion of these defenses which dealt with the alleged desire of some of the employees in the bargaining unit not to be represented by the Union and the alleged inappropriateness of the bargaining unit found by the Board, on the ground that they involved matters pertinent to the representation proceeding and had been disposed of therein (R. 52a–64a, 70a).

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violation of Section 8 (1) and (5) of the Act (R. 18–35). In reaching this conclusion, the Board treated the evidence offered by petitioner as though it had been received, but held that it was insufficient to overcome the evidentiary force of the "secret Board election." It further held that petitioner's challenge of the certification was "neither timely nor meritorious" (R. 31–32). It accordingly ordered petitioner to cease and desist its unfair labor practices, to bargain collectively with the Union, and to post appropriate notices (R. 34–35).

On August 31, and September 1, 1942, petitions for enforcement (R. 2b–6b) and for review (R. 38b–50b) of the Board's order were filed with the court below by the Board and petitioner, respectively. On October 10, 1942, petitioner filed with the court a motion for leave to adduce additional evidence (R. 11b–16b). The court handed down its opinions on January 18, 1943, enforcing the Board's order with a minor modification not here in issue, and denying petitioner's petition for review and its motion for leave to adduce additional evidence (R. 19b–32b, 55b). The court's decree was entered on February 1, 1943 (R. 33b–35b).

ARGUMENT

1. Petitioner contends that Section 9 (b) of the Act contains an unconstitutional delegation of legislative power in so far as it authorizes the Board to determine the unit appropriate for col-

lective bargaining. The validity of this provision was sustained against the same attack in *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146, 165. It is argued that this decision approved as standards only the phrases "employer unit", "craft unit," and "plant unit," but not the phrase "subdivision thereof." But in the *Pittsburgh Glass* case, the unit involved was a division of the company's operations, consisting of several plants,[5] and thus came within the standards prescribed as a subdivision of the employer unit.

2. The bargaining unit found appropriate by the Board was a "subdivision" of a "plant unit" and, hence, was within one of the categories expressly enumerated in Section 9 (b). The Board's finding was not "arbitrary or capricious," and is therefore binding upon the courts (*Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 113 F. (2d) 698, 701 (C. C. A. 8), aff'd, 313 U. S. 146).

In making its finding, the Board properly took into consideration the fact that unless the unit described in the Union's petition was found to be appropriate, those of petitioner's employees who had already organized would be denied the right to bargain collectively until their fellow employees chose to exercise that right. It thereby followed

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[5] *Matter of Pittsburgh Plate Glass Co.*, 10 N. L. R. B. 1111, 1115–1116.

an established policy,[6] that of considering the "extent of organization" among a company's employees. That policy is applied by the Board, as the statute demands, "to insure to employees the full benefit of their right to self-organization and to collective bargaining" (Section 9 (b), *infra,* p. 18). It is not applied arbitrarily. As we have shown, the employee group here selected was distinct and identifiable (*supra,* pp. 3–4). It was therefore feasible for the employer to bargain collectively with it as a unit.[7] There is no reason to assume, as petitioner suggests (Pet. pp. 12, 16–17), that the Board would divide the plant into several hundred units of 32 employees merely because it has established one such unit in this case. On the contrary, if other departments are organized in the future, the Board would presumably place them together in one unit if it appeared that the establishment of separate units would make collective bargaining difficult or impractical.

Petitioner contends that the Board's decision in the instant case is inconsistent with its subsequent holding in *Matter of Arlington Mills,* 31

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[6] See Board's *Third Annual Report*, pp. 157–158; *Fourth Annual Report*, pp. 83–84; cf. *Fifth Annual Report*, p. 64; *Sixth Annual Report*, p. 63.

[7] In fact, sorters and trappers have special problems of their own, caused by certain technological changes in petitioner's operations; wage problems which have arisen from these changes have been settled without reference to the wages paid in petitioner's other departments (R. 39, 52–68, 23a).

N. L. R. B. 21, 24–25.[8] In that case, however, as the court below noted (R. 25b), one competing union advocated a plant-wide union, and claimed membership of a substantial number of employees—one thousand—throughout the plant.

3. Petitioner urges (pp. 18–22) that it should have been permitted to call the individual employees in the bargaining unit to the stand to testify that they no longer wished to be represented by the Union. The Board was not required, after ascertaining the employees' desires as to representation by holding a secret election, to adopt the unreliable procedure of placing all of the employees on the witness stand to see if they had changed their minds, particularly on the basis of letters written a week after the election (R. 117).

This evidence was first submitted to the Board after the Board had issued its certification. It is contended that the Board erroneously failed to

[8] In only one of the other decisions cited by petitioner at page 11 of the petition was any question raised as to separate treatment of sorters or trappers. That case, *Matter of Colonie Fibre Co., Inc.*, 9 N. L. R. B. 658, did not involve a woolen mill and there is no evidence that the employees there described as "sorters" performed functions similar to the sorters and trappers in the instant case. The "sorters" in the *Colonie* case were not separately organized, and the Board rejected a contention on the part of the employer, unsupported by any considerations warranting separate treatment, that the "sorters" should be excluded from a unit of production and maintenance employees.

consider it and that the court below erred in upholding the Board and in denying petitioner's application for leave to adduce such evidence. We submit that the court's action in denying the application was well within its "sound judicial discretion." *Southport Petroleum Co.* v. *National Labor Relations Board,* 315 U. S. 100, 104.

The Board's holding that petitioner's attempt to challenge the results of the November 8 election was "neither timely nor meritorious" (R. 32) was clearly proper. Petitioner was in a position to call to the Board's attention the evidence which it later offered at least by November 28, since, accepting its allegations as true, it was in possession of the evidence on or about November 15 (R. 97–98) (*supra,* p. 6). Yet on that date, through its attorney, it filed an affidavit in support of its earlier motion to set aside the election which recited other specious grounds for the relief sought, but failed to mention the ground on which it now relies (*supra,* pp. 4–5). In refusing to accept evidence which could have been presented before the representation proceedings terminated in a certification, the Board here merely applied the rules which customarily apply to the reopening of proceedings on the ground of newly discovered evidence. It has full power to do so. Otherwise, the election and certification

machinery of Section 9 of the Act would be deprived of all value.

In any case, the Board considered the evidence offered and properly held it to be insufficient to overcome the clear showing of preference for the Union by a majority of the employees manifested by the result of the election. In rejecting petitioner's attempt to evade collective bargaining with the Union on the basis of an alleged change of heart by the employees, the Board and the court below acted in accord with the decisions of two other circuit courts of appeals holding that the certification procedure would be rendered unworkable if the employer were free to refuse to bargain with a certified union. *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, 478 (C. C. A. 5)[9]; *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 F. (2d) 760, 764–765 (C. C. A. 7), certiorari denied, 313 U. S. 590. There are no contrary decisions.

In sum, as the court below correctly noted (R. 286):

> * * * The Board has within its authority power to ascertain the will of the majority of a given group of employees by election or other means. The election method is chosen, we take it, because secret ballot is regarded as the most effective way

[9] Contrary to petitioner's assertion (Pet. p. 21), the alleged shift of majority in the *Whittier Mills* case took place, as here, prior to the commission of any unfair labor practice.

> of getting an untrammeled expression of the desire of the electorate. Surely it is not to be defeated of all its effectiveness by a communication, undisclosed to the Board, repudiating, immediately after the election was held, the ballot count. * * *

4. Petitioner avers that it was denied due process of law because the Trial Examiner who presided at the hearing in the representation proceeding was biased and prejudiced or otherwise disqualified because prior to the hearing he investigated the facts on behalf of the Board. The assumption on which petitioner principally relies in this connection (Pet. p. 24), is that the Trial Examiner issued an "intermediate report" to the Board. But no such reports are made to the Board in representation proceedings. National Labor Relations Board Rules and Regulations, Series 2, as amended, Article III, Sections 8 and 9. The Trial Examiner in the representation proceedings herein made no recommendations to the Board, nor did he participate in any way in the formulation of the Board's decision. He acted only as a presiding official at the hearing held for the purpose of accumulating evidence to be submitted to the Board. The court below properly stated (R. 30b):

> The preliminary investigation and the hearing in the representation proceeding are not contentious litigation; not even litigation, but investigation. It is made on behalf of

the Board by members of its staff. The outcome is merely a certification of a bargaining representative.

The fact that a representative of an administrative agency, acting in his official capacity, has participated in an investigation preliminary to a hearing does not establish bias or prejudice on his part, or disqualify him from presiding at a subsequent hearing in the proceeding.[10] This is particularly true when the object of the investigation is merely to determine matters relating to the holding of an election and not whether petitioner had violated the law.

Petitioner's assertions of error on the part of the Examiner, in further support of its contention that he was biased (Pet. pp. 24–25), were properly found to be without substance by the Circuit Court of Appeals; they are adequately treated in the opinion below (R. 29b). Petitioner does not show that it was prejudiced by the rulings complained of. In any case, "the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case." *Berger* v. *United States*, 255 U. S. 22, 31.

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[10] *Brinkley* v. *Hassig et al.*, 83 F. (2d) 351, 356–357 (C. C. A. 10); *Lumber Mutual Casualty Insurance Company* v. *Locke*, 60 F. (2d) 35, 38 (C. C. A. 2); *Reynolds* v. *United States, ex rel. Dean*, 68 F. (2d) 346 (C. C. A. 7), certiorari denied, 291 U. S. 679; *Ex parte Joyce*, 212 Fed. 282 (D. Mass.).

CONCLUSION

The decision of the court below is correct and presents neither a conflict of decisions nor any question of general importance. The petition should therefore be denied.

Respectfully submitted.

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National Labor Relations Board.

MAY 1943.

APPENDIX

The pertinent provision of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) is as follows:

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

U. S. GOVERNMENT PRINTING OFFICE: 1943

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 887

BOTANY WORSTED MILLS,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 888

BOTANY WORSTED MILLS,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF FOR BOTANY WORSTED MILLS IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

FREDERIC R. SANBORN,
Of Counsel for Botany Worsted Mills.

THE COURT PRESS, N. Y. C.

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REPLY BRIEF FOR BOTANY WORSTED MILLS IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

The Board argues in its brief in opposition to Botany's petition for writs of certiorari that Botany's attempt to challenge the results of the election of November 8, 1940, was neither timely nor meritorious.

Shortly after the election, and after November 15, 1940, Botany received two letters signed by 20 of the 32 employees who took part in the election. In these letters, the employees stated that they no longer desired to be represented by the union. In its brief, the Board com-

plains that Botany waited until March 7, 1941, before it officially notified the Board of this fact. This is a period of less than four months. The Board has declared this short period to be a lapse of time sufficient to bar the reopening of the hearings upon the ground of laches. The Board refused to reopen the hearings to consider the two letters upon the ground that Botany had moved too late.

Firstly, it ill-behooves the Board to adopt such an arbitrary attitude when, in case after case involving unfair labor practices, the Board has excused its own failure, or the failure of a union, to take action for periods running from two to four years. We cite a few cases in which motions to dismiss for laches made by respondents in unfair labor practice cases were invariably denied:

4 years: *The Barrett Co.*, 41 N. L. R. B. 1327, 1329;

3 years: *Cowell Portland Cement Co.*, 40 N. L. R. B. 652, 655;

2 years: *Brown Paper Mill Co.*, 36 N. L. R. B. 1220, 1222;

2½ years: *N. Y. & Porto Rico S. S. Co.*, 34 N. L. R. B. 1028, 1044, Footnote 28;

2½ years: *Colorado Milling & Elevator Co.*, 11 N. L. R. B. 66, 68.

By denying Botany's motion to reopen the hearings upon the ground of laches by a lapse of less than four months, the Board shows a tendency to excuse laches on the part of any one other than an employer.

It is also important to note that, assuming but not admitting that Botany was guilty of laches, Botany's alleged delay was not attributable to the employees, and should not prejudice their rights.

* * *

Moreover, in the instant case, the Board has given blind adherence to certain of its own private policies while at

the same time disregarding the public and primary purpose of the Act. In effect, the Board has made its so-called presumption of continuity irrebuttable. The Board has stated that there is a presumption that once the status of a collective bargaining agent is ascertained that that status continues. In its blind adherence to the so-called and irrebuttable presumption, the Board has entirely missed the most important point in the case.

That point is that the rights here brought to the attention of the Board and to the Court are not primarily the rights of Botany, nor the rights of the union. *They are primarily the rights of the employees.*

The legislators who made the National Labor Relations Act a law of the United States clearly and emphatically stated the purpose of the Act to be to protect the "*full freedom*" of employees to select representatives of their own choosing. The paramount importance of this policy is shown by the fact that the legislature has clearly set it out in §1 of the Act:

> "It is hereby declared to be the policy of the United States to * * * protect * * * the exercise by workers of *full freedom* of association, self-organization, and designation of representatives *of their own* choosing * * *".

Botany could not have waived or relinquished the employees' rights by any direct action on its part. How can it be said, then, that the employees' rights have been waived or relinquished indirectly, by Botany's alleged laches?

In the Botany case, the Board gave rigid support to its self-created presumption of continuity while at the same time it arbitrarily refused to accept cogent evidence offered to rebut that presumption.

All of the evidence so offered was offered to show that the employees had withdrawn any agency that might have been created by the election of November 8, 1940. Its sole purpose was to convince the Board that the full freedom of employees had in fact been exercised by them.

In refusing to accept the above mentioned evidence, the Board is guilty not merely of nonfeasance in failing to recognize the statutory right of the employees to change their minds. The Board is guilty of an affirmative misfeasance. The Board in actuality has affirmatively denied the employees their statutory right to freely choose—and freely change—their representatives, and it has held, by clear inference, that the rights of the employees can be destroyed by alleged negligence in asserting them by the employer.

No question of laches on the part of the employees themselves is even asserted by the Board, nor could it be. The employees are not, and never were, parties to this proceeding.

In view of the fact that the employees were not parties to this proceeding, and in an attempt to establish the true desires of the employees, Botany made numerous attempts to introduce evidence at the hearings to prove that the employees had withdrawn any agency that might have been given to the union.

On cross-examination an attempt was made to question one of the union officials in order to adduce testimony proving that shortly after the election of November 8, 1940, at a union meeting, the employees told that official, and other union officials, that they did not wish to have the union represent them for collective bargaining purposes. The trial examiner excluded this entire line of questioning (Bot. A, 68a).

At another point in the hearing, also upon cross examination, Botany attempted to obtain the names of the employees who were also members of the union for the pur-

pose of introducing their own testimony as to their desires. The trial examiner again cut short the questioning (Bot. A, 33a-35a, 42a).

At another time, Botany requested the issuance of subpoenas to all of the various employees, so that their testimony could be taken upon their own desires as to a collective bargaining agent. The Board refused to issue the subpoenas and refused to consider such evidence at any time (Bot. A, 45a to 75a).

As a last resort, in its endeavor to bring the desires of the employees before the Board, Botany attempted to reopen the hearing so that the two letters received by Botany after November 15, 1940, in which the employees expressed their dissatisfaction with the union, and the fact that they no longer desired to be represented by the union, could be received in evidence. Botany's motion for this relief was denied, showing a continuous purpose on the part of the Board to refuse to accept any evidence whatsoever of the actual desires of the employees themselves (Bd. A, 110-118).

Under the circumstances of this case, the Board should have leaned over backwards to make sure that every possible evidentiary fact concerning the desires of the employees was presented for its consideration.

In a case such as this one, which involves the basic policy of the United States, the Board itself should have taken, and not excluded, all relevant evidence, to make sure that it had all the facts.

Had all of the evidence been admitted, and all of the facts considered, there would have been substantial, uncontradicted evidence in the record to show that the so-called presumption of continuity had been completely rebutted.

Under such circumstances, the Board should either have dismissed the charges, or else it should have held a new election. With only 32 voters, a second election would

have been a simple matter. The failure of the Board to adopt this simple solution has not only resulted in several years of litigation, but has denied the employees their statutory guarantee of a full freedom of choice of a bargaining agent since March, 1941.

The Board's decision is squarely opposed to the statutory public policy of the nation, as enunciated in §1 of the Act. To sustain the Board's decision is to nullify the Act.

* * *

To illustrate that the so-called presumption of continuity is rebuttable, Botany, on page 21 of its main brief, cited numerous cases in which the courts have in every instance, so stated. To make this point stronger, Botany chose cases in which the courts stated the above rule to be true, but in which the courts refused to find that the presumption had been rebutted. In every one of these cases the Courts and the Board had found that the employer had been guilty of an unfair labor practice, usually to oust the union theretofore declared to be the collective bargaining agent. *That factor is not present in the Botany case as expressly found by the Circuit Court.*

Botany has no quarrel with these decisions. Conceivably where the shift in majority has been caused by an unfair labor practice on the part of an employer, it would be unjust to permit a shift, so induced, to be received in evidence to rebut the presumption.

On page 13 of its brief, the Board cites two of the said cases cited by Botany, as authority for the proposition that certification procedure would be rendered unworkable if the employer were free to refuse to bargain with a certified union. Botany again wishes to point out that in both of these cases an unfair labor practice was present. The courts accordingly refused to allow the presumption to be rebutted.

In a footnote on page 13 of its brief, the Board attempts

to distinguish only one of the cases cited by Botany: *N. L. R. B.* v. *Whittier Mills,* 111 Fed. (2d) 474. Since the Board does not attempt to distinguish the *Valley Mould & Iron Corp.* v. *N. L. R. B.* case, 116 Fed. (2d) 760, it must be taken as an admission that an unfair labor practice was a factor in that case influencing the court to refuse to allow the presumption to be rebutted.

As to the *Whittier* case the Board on page 13 of its brief claims that the alleged shift of majority took place prior to the commission of any unfair labor practice. By inference, this is an argument that the presumption was sustained even though the unfair labor practice could not have been a factor in the alleged shift of majority. The Board, therefore, argues, again by inference, that the presumption was sustained in the absence of an unfair labor practice.

A careful reading of the Board's decision in the *Whittier* case (*supra* 111 Fed. (2d) 474) and of the decision of the Circuit Court fails to disclose any basis for the above claim. On the contrary, it definitely appears that there was an unfair labor practice present in the case. The Circuit Court stated at page 478 to 479:

> "The Board has found that in this case there was not an emergency wage reduction, but there was a deliberate effort by a sudden well-timed wage cut to discourage if not defeat any bargaining on that subject. Such was the natural effect of it, and if that was its purpose, as the Board finds, adhered to after remonstrance, we hold that there was a refusal to bargain about wages within the Act.
>
> (14) 3. The Board goes further and finds that the wage cuts, so timed, and with total disregard of the Committee, were such a flouting of the Committee as necessarily discouraged the employees in maintaining their connection with and representation by it, and interfered with and coerced them contrary to Section

8(1). In the light of the intention attributed by the Board to the mills, we uphold this conclusion, though there is no express proof that any employee was in fact affected or his course changed thereby."

Referring to the time that the unfair labor practice took place, we refer to page 463 of the Board's decision (*Whittier Mills Co.*, 15 N. L. R. B. 457):

> "In coming to this conclusion, we are not unmindful of the fact that the status of the T. W. O. C. as the exclusive representative of the respondents' employees in the respective appropriate units was not questioned by the respondents at the times of the alleged refusals to bargain."

The Board also stated at page 462 of its decision:

> "At the hearing herein, for the first time, the respondents claimed that the T. W. O. C. ceased to represent a majority of the employees in the respective appropriate units some time prior to June, 1938."

Concededly from the above, the hearing took place after the refusal to bargain. It, therefore, appears that the alleged shift in majority took place between that time and the date of the hearing. From the above, it also appears that the first time the employer claimed that the union had ceased to represent a majority of its employees was at the hearing. There is nothing in the decision either of the Board or the Court to indicate the exact time.

From the quotation from the Circuit Court decision (*supra* 111 Fed. (2d) 474), it is clear that the Circuit Court based its decision upon the presence of an unfair labor practice. *The court also found that there was insufficient evidence presented by the employer to sustain a finding that a majority of the employees did not desire to be represented by the union.*

On page 478, the court stated:

> "There is no certain evidence that a majority of the present employees do not now desire representation by the Committee."

The *Whittier Mills* case, therefore, is merely authority for the proposition that where the court finds an unfair labor practice, or where insufficient evidence is offered to rebut the presumption, the court will refuse to allow the presumption to be rebutted.

As stated above, in the *Botany* case there was not even a scintilla of evidence indicating Botany to be guilty of an unfair labor practice. The Board made no claim of unfair labor practice in its complaint, although in its decision, there was some mention of coercion. The Circuit Court of Appeals affirmatively struck out from that decision, and from the cease and desist order of the Board, any finding of an unfair labor practice upon the ground that there was absolutely no evidence in the case to sustain such a finding.

In the absence of an unfair labor practice, and by refusing to accept evidence to rebut the presumption of continuity, the Board has again denied to the employees their guaranteed statutory right to freely choose representatives of their own choosing.

Botany's reply brief is submitted in an effort to bring before this Honorable Court, the point that the primary and sole purpose of the Act is to guarantee to employees an absolute free choice of representatives of their own choosing. Only actions that would tend to interfere with this right should influence the Board in administering the Act. The Board's self-created policies of convenience must fall before the primary purpose. In the instant case, in the absence of finding of an unfair labor practice, and in refusing to consider the evidence offered by Botany

to rebut the presumption, the Board denies the employees their primary right. We repeat, to sustain the Board's decision is to nullify the Act.

* * *

CONCLUSION.

The petition for writs of certiorari should be granted.

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